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BY EMAIL AND U.S. MAIL

July 1, 2009

Victor J. Izzo
Senior Engineering Geologist
Title 27 Permitting and Mining Unit
Central Valley RWQCB – Sacramento
11020 Sun Center Dr., #200
Rancho Cordova, CA 95670-6114

Re: Revised Draft Cleanup And Abatement Order, Central, Cherry Hill, Empire, Manzanita, And West End Mines, Colusa County.

Dear Mr. Izzo:

We are outside counsel for Sunoco, Inc. ("Sunoco"), which, without admitting any legal liability for Cordero Mining Company ("Cordero") and Sunoco Energy Development Company ("SEDC"), is responding on behalf of these corporate entities with respect to any liability they may have related to the geothermal exploration leases referenced in the June 10, 2009 Revised Draft Cleanup And Abatement Order No. R5-2009-XXXX, Central, Cherry Hill, Empire, Manzanita, And West End Mines, Colusa County, ("Draft Order" or "DO"), issued by the California Regional Water Quality Control Board, Central Valley Region ("Regional Board"). Sunoco believes that the Draft Order improperly names Cordero and SEDC as "dischargers" based on the provisions of California Water Code ("CWC") sections 13267 and 13304, and herein requests that they be removed from the Draft Order. This letter provides Sunoco's justification for their proposed removal.

Sunoco's request that Cordero and SEDC be removed from any future orders arises from: (1) the failure of the Draft Order to demonstrate that the parcels leased by Cordero and SEDC for geothermal exploration purposes overlap with any parcels containing any mercury mine waste; (2) the inapplicability of CWC sections 13267 and 13304 to non-dischargers such as Cordero and SEDC; (3) analogous federal law which indicates neither Cordero nor SEDC can be considered an owner or operator; (4) the Draft Order's overbroad treatment of Cordero and SEDC because it does not take into account the legal principle of divisibility; and (5) the absence of any empirical

evidence that any mercury-bearing sediment migrated from any mine waste on any parcel formerly leased by Cordero or SEDC into Sulphur Creek as a result of any geothermal exploration activities by either of those companies.

Sunoco believes it is fundamentally unfair for Cordero and SEDC to be identified as "dischargers" of mercury from mine waste when neither conducted any mercury mining at any site identified in the Draft Order and there is no evidence that, during their brief period as holders of geothermal lease rights, they engaged in any activities that caused the discharge of any mercury from any such activity. Thus, Sunoco requests that the Regional Board amend the Draft Order, removing Cordero and SEDC as "dischargers." Otherwise, Sunoco will file a Petition for Review and a Petition for Stay of Action with the State Water Resources Control Board. Sunoco welcomes the opportunity to meet with the Regional Board prior to the Regional Board's hearing dates set for August 13-14, 2009, to discuss these issues.

1. The Regional Board Has Not Adequately Demonstrated the Presence of Any Mercury Mining Waste on Any Parcels Leased for Geothermal Purposes by Cordero or SEDC.

Paragraph 5 of the Draft Order describes Cordero and SEDC as "...leaseholders of the Mine site[1] as determined by Central Valley Water Board staff's review of property records from the Colusa County Recorders [sic] Office." (DO p. 2; ¶ 5; emphasis added.) Yet, the Draft Order's description of the Central and Empire mercury mine sites ("Sites"), which Cordero and SEDC allegedly leased in the past, is vague and ambiguous, making Sunoco's ability to determine whether it actually leased these mine sites very difficult, if not impossible, without further clarification. Attachment B to the Draft Order identifies various "dischargers," and in many instances provides an Assessor Parcel Number ("APN") to correspond with each respective alleged discharger. Attachment B's references to Cordero and SEDC, however, fail to identify any APN that indicates exactly what parcels these entities leased. The Draft Order also fails to provide a map that identifies the specific Site boundaries at issue as they pertain to Cordero and SEDC, which relates back to our fundamental issue: Sunoco cannot determine whether Cordero or SEDC leased the Sites in question without clearly defined boundaries. Accordingly, Sunoco requests that the Regional Board revisit this issue and provide Sunoco with clearly defined Site boundaries using either APNs or some other means by which Sunoco can both determine whether Cordero and/or SEDC ever leased a parcel on which former mercury mine waste was present (not presently demonstrated), and to know the "Sites" it is being asked to investigate. Sunoco welcomes the opportunity to clarify the description of the Sites with the

[1] By way of clarification, Sunoco notes that documents produced by the Regional Board related to the Draft Order in response to the request of Edgcomb Law Group/Sunoco reveal that the Draft Order's characterization of Cordero and SEDC as lessees of the "Mine site" is somewhat misleading. The leases held by Cordero and SEDC were for ***geothermal exploration***, and were unrelated to any mercury mining activity at any site identified in the Draft Order.

Regional Board through discussion and an exchange of documents at or before the August 13-14 hearing.

Until the Regional Board can clearly demonstrate that any mine waste was present on any of the parcels apparently leased by Cordero or SEDC for geothermal purposes, Sunoco respectfully requests that the Regional Board remove Cordero and SEDC from any subsequent draft or final orders regarding the Sites.

2. Neither Cordero Nor SEDC Are "Dischargers" Under CWC Sections 13304 and 13267 As A Result of Their Geothermal Leases and Exploration Activities.

Even if there was any mercury mining waste on any of the parcels leased by Cordero or SEDC for geothermal investigation purposes, the Regional Board bases the Order on CWC sections 13267 and 13304, which do not create liability for mere geothermal lessees such as Cordero and SEDC, without further evidence of their having caused a discharge of the contaminants at issue (mercury mine waste). First, the Regional Board has not met the requirement under section 13267[2] of "identifying the evidence that supports requiring [Sunoco] to provide the reports." Merely referencing the facts that Cordero and SEDC held geothermal leases is insufficient to establish that they caused any discharge of any mercury mine wastes.[3] Nor has the Regional Board produced any evidence showing any nexus between Cordero or SEDC and mercury mining activity at any of the sites referenced in the Draft Order. Again, the Regional Board's mere identification of Cordero and SEDC as having held geothermal leases allegedly covering parcels on which former mercury mine wastes allegedly exist does not provide the Regional Board with a reasonable or rational basis for concluding, as it apparently does, that these entities have "discharged" any mine waste.

Similarly, the Regional Board has not met the requirements of CWC section 13304[4] in naming Cordero and SEDC as "dischargers." As discussed above, the Regional Board has

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[2] Section 13267(b)(1) provides in relevant part: "In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging...waste within its region...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

[3] We also note that the Draft Order is inconsistent and unfair in its treatment of Cordero and SEDC compared with the State of California by the Regional Board, in that it names the former companies as "dischargers" under the Draft Order, but not the State, even though Attachment B to the Draft Order identifies the "State of California (all quicksilver rights)" as a lessee of some of the sites at issue in the Draft Order.

[4] CWC section 13304(a) provides in relevant part: "Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition

provided no conclusive evidence that either Cordero or SEDC conducted any mercury mining activities or otherwise "discharged" any mercury mine waste in connection with the limited geothermal investigation activities they conducted on the properties they leased.

For example, paragraph 3 of the Draft Order focuses on "***[m]ining waste*** [that] has been discharged onto ground surface where it has eroded into Sulphur Creek, resulting in elevated concentrations of metals within the creek…", yet alleges only that "***[t]he Dischargers either own, have owned, or have operated the mining sites*** where Mines are located and where mining waste has been discharged." (DO pp. 2-3; ¶ 3.) Neither Cordero nor SEDC ever owned or "operated" the mining sites at issue. Instead, at most, they only held geothermal leases for short time periods and conducted limited geothermal investigation activities. The Regional Board's Draft Order is therefore without factual basis as it pertains to Cordero and SEDC since it fails to cite to any evidence that Cordero or SEDC "discharged" any of the referenced mercury mining waste. Thus, Sunoco respectfully requests that the Regional Board amend the Draft Order and any subsequent final order to not include Cordero or SEDC.

3. Analogous Federal Case Law Suggests That Cordero and SEDC, Merely By Entering Into Geothermal Leases, Did Not "Operate" any Mine Site.

In a related and therefore relevant context, federal law does not support the imposition of liability upon lessees Cordero and SEDC as "operators" or "owners" under CERCLA.

A. Neither Cordero Nor SEDC Would Be Considered an "Operator" Under CERCLA.

While the draft Order suggests that Cordero and SEDC can be considered "dischargers" under CWC §§ 13267 and 13304 because of their status as "owners or operators" of the Sites, analogous federal case law applied to the facts of this matter demonstrate that, as to the mine waste at issue here, neither Cordero nor SEDC qualify as either an "owner" or an "operator" with liability for the mine waste. Under federal law, a finding that geothermal lessees Cordero and SEDC were "operators" of the mercury mine would require a showing that they managed, directed, or conducted operations specifically related to the pollution at issue, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations. See United States v. Bestfoods, 524 U.S. 51, 66-67 (1998). The terms of the geothermal exploration leases entered into by Cordero and SEDC do not support a

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issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts…."

finding that Cordero or SEDC were "operators", and several cases support this conclusion. (See, e.g., Nurad Inc. v. Wm. E. Hooper & Sons, Co., et al., 966 F.2d 837, 842 (4th Cir. 1992) (court refused to impose "operator" liability on a lessee of a building for contamination that occurred as a result of leaks from underground storage tanks built by the prior property owner that occurred adjacent to the leased building during the tenant's leasehold); Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341-1342 (9th Cir. Cal. 1992) ([R]eiterating the well-settled rule that "operator" liability under section 9607(a) (2) only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment; CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 788 (W.D. Mich. 1989) ("The most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution.").)

The Supreme Court's decision in United States v. Bestfoods, 524 U.S. 51 (1998) clarified the test for "operator" liability as follows:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." (United States v. Bestfoods, 524 U.S. 51 at 66-67.)

Here, Cordero and SEDC did not "manage, direct or conduct" the mercury mining operations that gave rise to the alleged mercury pollution at the Site such that they could be considered "operators" of the Site. Furthermore, Cordero and SEDC did not have the authority to control any mercury mining waste at the Site, let alone exercise any "actual control" over the Site, such that they should be considered operators. Indeed, there is no evidence Cordero or SEDC were even aware of the presence of any mercury mining waste at the site. Thus, by analogy, Sunoco contends that the Regional Board is incorrect in asserting that Cordero and SEDC should be considered liable as "dischargers" under the CWC because, as mere geothermal lessees, they somehow became "operators" of the historical mercury mines or mining waste on the Sites.

B. Nor Do Cordero or SEDC Have "Owner" Liability as Mere Lessees.

Nor would Cordero and SEDC be considered "owners" under CERCLA as a result of their brief status as geothermal lessees because, under well-established case law, they never had the requisite indicia of ownership to be considered *de facto* owners of the property. For example, in Commander Oil Corp. v. Barlo, 215 F.3d 321 (2d Cir. 2000), a property owner initiated a contribution action against its lessee for response costs related to a release caused by a sublessee's operations. The Barlo court outlined several factors that "might transform a lessee

into an owner" such as: (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs. This non-exclusive list is meant to reinforce the point that the critical question is whether the lessee's status is that of a de facto owner and not whether it exercises control over the facility. (Barlo, 215 F.3d at 330-331.)

Here, based upon the documents provided by the Regional Board, neither Cordero nor SEDC can be considered *de facto* owners. The lease between Magma and Cordero and D.D. Feldman contains none of the provisions considered important in the determination of *de facto* ownership by Barlo. The Magma-Cordero lease was for a limited term, (seven and one half years), Cordero was not allowed to sublease the property without prior approval, and the lease was subject to termination by the lessor if certain terms were not met.

Thus, again, by analogy, Sunoco contends that the Regional Board is incorrect in asserting that Cordero and SEDC should be considered liable as "dischargers" under the CWC because, as mere geothermal lessees, they somehow became "owners" of the historical mercury mines or mining waste on the Sites.

4. Divisibility of Cordero's and SEDC's Operations.

The Order's requirements that Sunoco submit a work plan and investigative report related to the "Site" and "mine site" are overly broad, given that Sunoco's research demonstrates that Cordero and SEDC conducted geothermal investigations (each apparently drilling only one well and then abandoning it) on only a very small portion of the Site during a very limited time frame. Moreover, the California Division of Oil and Gas documents produced by the Regional Board reveal that Cordero complied with all state regulations and properly capped and abandoned its geothermal exploration well.

Given Cordero's and SEDC's small, divisible footprints at the Site, Sunoco objects to the Order's finding that these entities "have operated the mining sites...."

A reading of the plain language of the California Water Code reveals that a "discharger" is only liable for that which it discharged. It is not liable for investigating and remediating the geographically unrelated discharges of others. Federal law also reflects this view. Applied here, that legal principle means Sunoco cannot be required to investigate sources of mercury contamination unrelated to Cordero's or SEDC activities at the Site. Nor should Sunoco be required to collect or evaluate data, or propose interim remedial actions, related to on-going and future discharges to surface and groundwater that were caused by other PRPs.

5. Though Cordero and SEDC Are Not Dischargers, Even If they Were, The Proposed Order Is Not Justified By Limited, Existing Data Re: Mercury In Surface Water Runoff.

The Draft Order is premature in that it contains inadequate information that there has even been a discharge of mercury waste from the Central and Empire mine sites. Paragraph 20 of the Draft Order *estimates* that the mercury load from Central Mine is 0.003 to 0.03 kg/yr or 0.16% of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek. Similarly, paragraph 20 *estimates* that the mercury load from the Empire Mine is 0.04 to 0.06 kg/yr or 0.32% of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report). This low amount of even estimated mercury loading from the Sites is likely the result of the good ground cover that has developed over the years. The significant amount of naturally occurring mercury in Sulphur Creek combined with an apparent over-estimation of erosion of mine-tailings contributing mercury to Sulphur Creek indicates that the nature of site conditions remains largely uncertain, and that the Regional Board needs to conduct considerable investigative work – including the assessment of natural or background conditions – prior to determining that there has been any discharge of mercury mine waste at these Sites meriting the assessment of liability for investigation and remediation of the Sites and Sulphur Creek.

The water quality of Sulphur Creek is naturally degraded. The highest concentrations of mercury and dissolved solids in Sulphur Creek are found in water from the natural springs that enter the creek. Mining is not believed to have affected or altered the water quality from the springs (Regional Board, 2007). Further, it has been reported that a major portion of the mercury content in Sulphur Creek is from the naturally occurring springs and that the presence of the mine workings contributes a significantly lesser amount of mercury to the creek. Therefore, even if the parties made the considerable investment to remediate all of the mine tailings, and it were assumed that all of the mercury contributed by the mines were to be remediated, the overall water quality of Sulphur Creek would remain poor with elevated mercury concentrations based on the naturally occurring background levels.

Statements regarding the erosion of the mine tailings as a key source of mercury to Sulphur Creek appear to be overstated as a result of the generalized nature of runoff modeling previously conducted. Thus, Sunoco requests that the Regional Board conduct investigations of mercury background levels and mine site contribution prior to issuing any final cleanup and abatement order.

Conclusion.

For the above-stated reasons, Sunoco believes that the Regional Board's Draft Order improperly identifies Cordero and SEDC as "dischargers" without sufficient legal or factual basis. Sunoco therefore requests that the Regional Board, after reviewing this letter and the evidence establishing the details of Cordero's *de minimis* and divisible involvement at the Site,

rescind the Draft Order as it relates to Cordero and SEDC or issue a final order without listing either entity as a respondent. Sunoco hopes to work cooperatively with the Regional Board in resolving the issues raised in this letter and requests a meeting with the Regional Board prior to the August 13-14 hearing to discuss them.

Very truly yours,

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